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RACE, REGION, AND VOTE CHOICE IN THE 2008 ELECTION: IMPLICATIONS FOR THE FUTURE OF THE VOTING RIGHTS ACT

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The election of an African American as President of the United States has raised questions regarding the continued relevance and even constitutionality of various provisions of the Voting Rights Act (VRA). Barack Obama's apparent success among white voters in 2008 has caused some commentators to question the background conditions of racially polarized voting that are key to litigation under section 2 of the VRA. His success in certain states, such as Virginia, has also raised doubts about the formula for coverage of jurisdictions under section 5 of the VRA. This Article examines the data from the 2008 primary and general elections to assess the geographic patterns of racial differences in voting behavior. The data suggest that significant differences remain between white and minority voters and among jurisdictions that are covered and not covered by section 5 of the VRA. These differences remain even when controlling for partisanship, ideology, and a host of other politically relevant variables. This Article discusses the implications of President Obama's election for legal conceptions of racially polarized voting and for decisions concerning which jurisdictions section 5 ought to cover.

INTRODUCTION: THE VOTING RIGHTS ACT AND THE ELECTION OF AN AFRICAN AMERICAN PRESIDENT

When Congress passed the Voting Rights Act of 1965¹ (VRA), the election of an African American President was inconceivable. Even when Congress reauthorized expiring provisions of the VRA in 2006,² such an election appeared a distant possibility. Now, as the Supreme Court has cast constitutional doubt on the reauthorized VRA,³ what once seemed impossible or unlikely has become concrete and

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¹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (2006)).

² Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

³ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) [hereinafter *NAMUDNO*].

real: a member of the racial minority for whom the VRA was written occupies the Oval Office.

It is unsurprising, then, that the election of Barack Obama has led some commentators to question both the relevance⁴ and the constitutionality⁵ of the VRA. If an African American candidate can win a majority of the national vote and even do better than previous Democratic nominees among white voters in states as varied as Colorado, Indiana, and Virginia, do the fundamental assumptions underlying the VRA need to be rethought? In particular, does the 2008 election signal a fundamental shift in race-based patterns of voting behavior, such that the geographic reach of section 5 of the VRA⁶ or the primacy of racially polarized voting in analysis under section 2 of the VRA⁷ requires updating?

In this Article, we assess the patterns of race and political preference in the 2008 election and consider their relevance for the meaning and constitutionality of the VRA.⁸ The exit polls and election returns suggest that the 2008 election did not represent a fundamental shift in national patterns of race and vote choice. However, these national patterns mask great variation at the state and county level. In particular, Obama's relative success among white voters, as compared to John Kerry four years earlier, varied greatly by region. In the Deep South, Obama actually did worse than Kerry among white voters. Nationally, Obama did much better among African Americans and Latinos, with both groups turning out to vote at higher rates and giving him a higher proportion of their votes.

We view these findings as principally a response to the charges that the 2008 election represented a fundamental transformation in voting patterns relevant to the VRA. However, we recognize that this evi-

⁴ E.g., Abigail Thernstrom & Stephan Thernstrom, Op-Ed., *Racial Gerrymandering Is Unnecessary*, WALL ST. J., Nov. 11, 2008, at A15.

⁵ E.g., Brief for Appellant at 2-3, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 453246.

⁶ 42 U.S.C. § 1973c (2006).

⁷ *Id.* § 1973b.

⁸ This Article expands upon an amicus brief we filed on behalf of neither party in *NAMUDNO*. See Brief for Nathaniel Persily et al. as Amici Curiae on Behalf of Neither Party, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=151457. The brief was mentioned by Justice Kennedy at the oral argument, see Transcript of Oral Argument at 55-56, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-322.pdf, and cited by numerous commentators at the time of the hearing. See, e.g., Robert Barnes, *High Court to Weigh Relevance of Voting Law in Obama Era*, WASH. POST, Apr. 1, 2009, at A1; Adam Liptak, *Review of Voting Rights Act Presents a Test of History v. Progress*, N.Y. TIMES, Apr. 28, 2009, at A16; Jeffrey Toobin, *Voter, Beware*, NEW YORKER, Mar. 2, 2009, at 19; Posting of Linda Greenhouse to The Supreme Court Breakfast Table, <http://www.slate.com/id/2220927/entry/2221036> (June 22, 2009, 13:39 EST).

dence bears on an ongoing debate concerning the relevance of racially polarized voting patterns, particularly to the constitutionality of section 5 of the VRA,⁹ as well as perhaps to the continued operation of section 2. In Part I we discuss the importance of racially polarized voting patterns for the meaning of section 2 and the constitutionality of section 5 of the VRA. Part II presents background data from 1984 to 2004 against which we can judge any transformation that took place in the 2008 election. The data show persistent differences between minorities and whites in their candidate preferences and between the preferences of whites in the covered and noncovered states.¹⁰ Part III presents the data from the 2008 general and primary elections and analyzes Obama's relative success in the states covered and not covered by section 5 of the VRA. We pay particular attention to differences in the behavior of white voters between 2004 and 2008. We analyze exit poll results, aggregated election returns, and other survey data to conclude that the differences in candidate preferences in 2008 between whites in the covered and noncovered states cannot be completely explained by partisan, ideological, or demographic differences. Such factors, especially party identification, can account for the differences in the voting behavior of whites across covered and noncovered jurisdictions observed in 2004, but these factors do not account fully for the differences observed in 2008. The Conclusion discusses the implications of our findings for cases going forward.

We should admit up front to an ambivalence as to the role of the 2008 election in current debates over the VRA. We believe that the VRA, and especially the coverage formula for section 5, needs to be updated or revised specifically to provide greater protection for minority voting rights.¹¹ However, we also believe the VRA continues to represent a constitutional exercise of congressional power under the Fourteenth and Fifteenth Amendments.¹² Congress provided a sufficient record of threats to minority voting rights in the covered jurisdictions to justify the continued operation of the law even in its current form.¹³ The results of a single presidential election, whatever they

⁹ See *NAMUDNO*, 129 S. Ct. at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁰ See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, SECTION 5 COVERED JURISDICTIONS, available at http://www.usdoj.gov/crt/voting/sec_5/covered.php (listing as covered states: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia).

¹¹ This topic is not the subject of this article, but one of us has written extensively on it. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 222-23 (2007).

¹² See Nathaniel Persily, *The Constitutional Relevance of Alleged Legislative Dysfunction*, 117 YALE L.J. POCKET PART 256 (2008), <http://www.yalelawjournal.org/images/pdfs/678.pdf>.

¹³ See Persily, *supra* note 11, at 192-216.

may show, do not shake our belief either in the necessity of reform or in the constitutionality of the currently flawed law. Nevertheless, because the unprecedented 2008 election occurred in the midst of a constitutional challenge to section 5 of the VRA, the election caused handwringing over the importance of election results for the constitutionality and desirability of the VRA.

Proponents and opponents of the VRA alike will seek to find support in the data presented here. For those supportive of the VRA, we demonstrate the persistence of race-based differences in presidential voting patterns, especially in the states covered by section 5 of the VRA. There can be no question that the gap in vote preferences between white and minority voters is larger in the covered states than in the noncovered states, as a group. These differences, at least with respect to whites' support in 2008, cannot be explained away by the fact that the whites in the covered states are more Republican, more religious, or more conservative.

All that considered, there is great diversity among the states, regardless of coverage status, in the racial gap in voter preferences and the propensity of whites to vote for Obama. Although whites in the covered states did not, as a group, vote in larger shares for Obama, that is because in some states (such as Virginia) he did better among whites compared to 2004, while in other states (such as Mississippi, Alabama, and Louisiana) he did worse. Although he generally improved over Kerry's vote share in the noncovered states, in Arkansas Obama did worse among whites. And, in the end, the fact that Obama received a share of the white vote in the covered states that was comparable to that received by John Kerry, a white candidate, only four years prior signals how far we have come since the passage of the VRA.

I. THE POTENTIAL LEGAL IMPLICATIONS OF THE 2008 ELECTION

Whether one takes the most anemic view of voting rights, as limited to the casting and counting of ballots,¹⁴ or even the more capacious view, as concerning anything affecting the "power" of one's

¹⁴ See, e.g., *Holder v. Hall*, 512 U.S. 874, 893, 914-15 (1994) (Thomas, J., concurring in the judgment) (arguing that the VRA ought to be limited to barriers to participation and not to extend to dilution); *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (concluding that the Fifteenth Amendment did not concern dilution); *id.* at 84 n.3 (Stevens, J., concurring in the judgment) (characterizing plurality opinion as concluding that the Fifteenth Amendment "applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar").

vote,¹⁵ candidate success does not bear ineluctably on questions concerning the abridgement of voters' rights. Whether specific candidates win or lose does not necessarily speak to the question of whether voters' rights were respected in the electoral process.

As voting law has moved from a preoccupation with access and participation to inquiries concerning dilution, however, the relative success of minority-preferred candidates has become a central focus of courts and litigants attempting to assess voting rights progress or lack thereof.¹⁶ Successful claims of illegal vote dilution under section 2 of the VRA depend on a demonstration that racially polarized voting patterns hinder the election of minority-preferred candidates.¹⁷ Moreover, in the findings of the newly reauthorized section 5, Congress expressly mentioned racially polarized voting in the covered jurisdictions as one of the justifications for the law.¹⁸ At the end of this Article, we return to the questions of whether and when polarization should be relevant for voting rights law, but for present purposes, we simply note the centrality of racial bloc voting to the statutes of concern and the historical and legal debates.

A. *The Role of Racially Polarized Voting in Litigation Under Section 2 of the VRA*

*Some commentators suggest that racially polarized voting is waning — as evidenced by, for example, the election of minority candidates where a majority of voters are white. Still, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and [section] 2 must be interpreted to ensure that continued progress.*¹⁹

¹⁵ See, e.g., 42 U.S.C. § 1973(c)(1) (2006) ("The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."); *Allen v. State Bd. of Elections*, 393 U.S. 544, 566, 569–70 (1969) (holding section 5 of the VRA is applicable to any law that affects the weight of a citizen's vote, including dilutive systems of representation).

¹⁶ See generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

¹⁷ See 42 U.S.C. § 1973(b) ("The extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered [in assessing whether] the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class of citizens.").

¹⁸ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(3), 120 Stat. 577 ("The continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.").

¹⁹ *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) (plurality opinion) (citations omitted).

"Racially polarized voting" or "racial bloc voting" is a term of art in voting rights law.²⁰ The concept has its genesis in racial vote dilution cases brought under the Fourteenth Amendment.²¹ It played an important role in the legislative history of the 1982 amendments to the VRA,²² and then became the touchstone of the Supreme Court's test from *Thornburg v. Gingles*²³ for proving illegal vote dilution. If the 2008 election revealed decreasing rates of racial polarization in the electorate — certainly a plausible hypothesis given Obama's success — the election results might indicate that section 2 cases would be more difficult to win in the future.

Section 2 of the Voting Rights Act prevents jurisdictions from enacting voting laws that deny or abridge the right to vote "on account of race."²⁴ It specifies that a violation of the law occurs when, based on the "totality of the circumstances,"

it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered . . .²⁵

Section 2 litigation is almost exclusively concerned with vote dilution by way of at-large systems of representation or redistricting plans.²⁶ When successful, it usually leads courts to create majority-minority districts that give minority voters a greater chance of electing their preferred candidates.²⁷

²⁰ See *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986) ("[R]acial polarization' exists where there is 'a consistent relationship between [the] race of the voter and the way in which the voter votes,' or to put it differently, where 'black voters and white voters vote differently.' We, too, adopt this definition of 'racial bloc' or 'racially polarized' voting." (alteration in original) (citations omitted)). See generally Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

²¹ See, e.g., *White v. Regester*, 412 U.S. 755 (1973).

²² S. REP. NO. 97-417, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206.

²³ 478 U.S. 30 (1986).

²⁴ 42 U.S.C. § 1973(a) (2006).

²⁵ *Id.* § 1973(b) (emphasis added).

²⁶ See, e.g., *Bartlett v. Strickland*, 129 S. Ct. 1231, 1238–39 (2009) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 409–10 (2006) [hereinafter *LULAC*]; *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994); *Grove v. Emison*, 507 U.S. 25, 27 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).

²⁷ See *Holder v. Hall*, 512 U.S. 874, 897 (1994) (Thomas, J., concurring in the judgment) ("Perhaps the most prominent feature of the philosophy that has emerged in vote dilution decisions since *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)] has been the Court's preference for single-member districting schemes, both as a benchmark for measuring undiluted minority voting strength and as a remedial mechanism for guaranteeing minorities undiluted voting power.").

The Supreme Court's decision in *Gingles* established a threshold test for demonstrating that an at-large system or districting arrangement dilutes minority votes.²⁸ If a minority group is large enough to constitute a majority in a single-member district,²⁹ votes cohesively, and is systematically outvoted by whites, then it will likely have a vote dilution claim under section 2.³⁰ The structure of an at-large scheme or districting arrangement coupled with the voting behavior of each racial group, under this view, may dilute the votes of the racial minority.

Demonstrating "racially polarized voting" is, therefore, the key to proving a violation of section 2³¹ (even though courts require that plaintiffs prove the so-called "Senate Factors"³² as well). A plaintiff

²⁸ *Gingles*, 478 U.S. at 46-50.

²⁹ See *Strickland*, 129 S. Ct. at 1241-46 (plurality opinion) (making clear that the *Gingles* test requires minorities to be large enough to constitute a voting age majority in a single member district).

³⁰ See *Gingles*, 478 U.S. at 50-51. Of course, the ingredients for a successful vote dilution lawsuit are more complicated than that and include proving the so-called "Senate Factors." See *id.* at 43-46; see also *Johnson*, 512 U.S. at 1000 (holding that "proportionality" is a factor counting in favor of a districting plan's legality). See generally Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, University of Michigan Law School, 39 U. MICH. J.L. REFORM 643, 675-732 (2006) (describing Senate Factors as litigated in the lower courts).

³¹ See *Gingles*, 478 U.S. at 55-58.

³² The "Senate Factors" refer to the list of factors necessary to prove a vote dilution claim as delineated in the Senate Report accompanying the 1982 Amendments to the Voting Rights Act. They include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

does this by using illustrative elections from the jurisdiction to demonstrate that minorities and whites vote for different candidates, and the minority-preferred candidates consequently lose. Presidential elections, let alone the Obama victory, would not ordinarily be seen as typical or illustrative for most voting rights cases, the lion's share of which concern municipal or state legislative elections.³³ However, whether the 2008 election is offered as a counterexample in litigation or merely as a talking point concerning the racial polarization that section 2 is supposed to address in general, the data from it draw attention to some of the ongoing controversies in this area of the law.

In particular, the election has brought to the fore the oft-made arguments concerning the role of partisanship in measuring racial polarization and the definition of a minority candidate of choice.³⁴ Without getting too deep into the weeds of voting rights law, suffice it to say that the correlation between race and partisanship has posed some challenges to the *Gingles* framework.³⁵ The central question in this realm concerns how the law should respond to a situation in which a high correlation between race and partisanship makes it difficult for a plaintiff to prove that race, rather than party, better "explains" the voting behavior of different groups. In other words, if minority-preferred (usually Democratic) candidates lose because white Republicans tend to vote against them, does the partisan "explanation" for their loss immunize the districting plan from liability for the racially disparate impact it nevertheless presents?

For the *Gingles* plurality, the bivariate relationship between race and vote choice was the only relevant statistic. Justice Brennan's opinion stated:

For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates.³⁶

In other words, because section 2 is about disparate impact, not intent, the "reason" why voters of one racial group might differ from another in their voting preferences is unimportant. Plaintiffs should not be

Gingles, 478 U.S. at 36–37 (quoting S. REP. NO. 97-417, at 28–29, reprinted in 1998 U.S.C.C.A.N. 177, 206–07).

³³ See Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 62 (2009).

³⁴ See Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1522, 1529 (2002) (describing the significance of rising partisan competition in the South for purposes of voting rights law).

³⁵ See generally *id.*; Elizabeth M. Ryan, Note, *Causation or Correlation? The Impact of LULAC v. Clements on Section 2 Lawsuits in the Fifth Circuit*, 107 MICH. L. REV. 675 (2009).

³⁶ *Gingles*, 478 U.S. at 62 (plurality opinion).

forced to show racial animus, only that the voting behavior of different groups makes it more difficult for minority-preferred candidates to be elected. Indeed, as many commentators have argued, attitudes on issues concerning race have sometimes led voters to affiliate with particular parties.³⁷ Moreover, in a strict statistical sense, neither race nor party *causes* someone to vote for a particular candidate. Rather, at most, they represent group characteristics that might shed light on the reasons — racial identity or animus on the one hand, or ideological affinity and partisan loyalty on the other — why a voter might prefer one candidate over another. Even if multivariate analysis might demonstrate that partisanship is a more powerful predictor of candidate preferences than race, divergent voting behavior is still what prevents minorities under certain districting arrangements from having an “equal opportunity to elect” their preferred candidates.

Nevertheless, the view that a mere bivariate relationship between race and vote choice should suffice did not garner a majority of the Court, and the lower courts have been split as to whether a strong party-race correlation can defeat a claim of racial polarization. The Fifth Circuit sitting en banc in *League of United Latin American Citizens v. Clements*,³⁸ for example, held that the *Gingles* test is not satisfied “[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens.”³⁹ The Fifth Circuit is not alone. One study found that “[c]ourts in nine judicial circuits now expressly or implicitly incorporate causation when they assess racial bloc voting.”⁴⁰

One way courts attempt to address this intractable race-party dynamic (as well as to resolve the related issue of who is a minority community’s “candidate of choice”) is to focus on elections in which minority candidates oppose white candidates.⁴¹ If minority Democratic candidates tend to receive less of the white vote than white Democratic candidates, the argument goes, then race, rather than party, might better “explain” voting patterns. The *Gingles* plurality (and only the plurality) emphasized that “it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.”⁴² However, the lower courts have often considered elections that pit minority candidates against white

³⁷ See, e.g., Bernard Grofman & Lisa Handley, 1990s Issues in Voting Rights, 65 MISS. L.J. 205, 222–30 (1995); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1223–26 (1996) (discussing difficulties disaggregating race and politics).

³⁸ 999 F.2d 831 (5th Cir. 1993) (en banc).

³⁹ *Id.* at 850; see also *id.* at 863 (“Electoral losses that are attributable to partisan politics do not implicate the protections of § 2.”).

⁴⁰ Katz et al., *supra* note 30, at 671.

⁴¹ See *id.* at 665–68; Persily, *supra* note 11, at 221–23; Pildes, *supra* note 34, at 1526 n.22.

⁴² Thornburg v. Gingles, 478 U.S. 30, 68 (1986) (plurality opinion).

candidates to be the "most probative" of legally significant racial bloc voting.⁴³

We mention these gray areas in the law because the data we provide later in this Article allow us to grapple with and shed light on these controversies at a macro level. In particular, we pay close attention to the counterargument that party or ideology "explains" the gap in candidate preferences that exists between minorities and whites. Much of the story we tell is a familiar one that demonstrates the breakdown of the Democratic Party's monopoly in the South and the rise of the Republican Party among Southern whites. However, we also compare earlier results with those from the 2008 election, in which Barack Obama was, by any definition, the candidate of choice of African American voters.⁴⁴ In some states, this undisputed candidate of choice did worse among whites than did his predecessor who ran under much less favorable circumstances.⁴⁵

At the same time, Obama's relative success in many other states may reveal the potential for minority candidates in those jurisdictions. In many states, all outside the South, Obama was able to win the white vote and therefore win the state.⁴⁶ In still others (ten states according to the exit polls, including North Carolina, Virginia, and Florida), he lost among whites, but minority voters put him over the top.⁴⁷ Finally, there are the states he lost, where he did not win a substantial share of the white vote and/or the minority population was not sizable enough for him to make up for that loss.⁴⁸ To use the parlance of section 2 to describe the geography of his victory: some states exhibited low rates of white bloc voting, and in others, despite high bloc voting, the minority community could still elect its candidate of choice.

Throughout our discussion of the data we refer to "racial differences in voting" or "racially differential voting patterns," in order to avoid the loaded jargon of polarization in section 2 jurisprudence. Accommodating the divergent notions of racial polarization discussed above,

⁴³ See Issacharoff, *supra* note 20, at 1855 n.111 (citing cases that discuss candidate race); Scott Yut, Comment, *Using Candidate Race To Define Minority-Preferred Candidates Under Section 2 of the Voting Rights Act*, 1995 U. CHI. LEGAL F. 571, 583-86 (describing Fifth and Seventh Circuit cases that discount races involving only white candidates).

⁴⁴ Because Obama did not win a majority of Hispanic votes in the Democratic primary, however, it is questionable whether he should be considered the Hispanic candidate of choice. Support from minorities in the general election ordinarily does not suffice to demonstrate a candidate is the choice of the minority community. See *LULAC*, 548 U.S. 399, 445-46 (2006) (opinion of Kennedy, J.) (suggesting that Martin Frost did not demonstrate that he was the candidate of choice of the African American community merely because the community preferred Frost over a Republican candidate).

⁴⁵ See Table 9.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

we present both bivariate correlations and multivariate regressions that attempt to control for partisanship and other factors that influence the vote. By comparing the 2008 election with its predecessors, moreover, we can discern changes in group-based voting behavior under the unique conditions when an African American candidate appears in the race. Whether we look at the simple correlations between race and vote choice or at multivariate analysis that controls for other demographic, partisan, or ideological variables, the results are the same. Race played a greater role in predicting vote choice in the 2008 presidential election than it did four years earlier, and whites in the covered states were less likely to vote for Obama than whites in the noncovered states.

B. The Coverage Formula for Section 5 of the VRA

Our principal goal in the data analysis here was to assess the differences in race-based voting patterns between the covered and noncovered jurisdictions under section 5 of the VRA. Jurisdictions are covered under section 5 if they employed a "test or device," such as a literacy test, and had voter turnout under 50% in the 1964, 1968, or 1972 elections.⁴⁹ The primary question involved in the constitutional challenge to section 5 that the Supreme Court considered last year was whether such jurisdictions continue to represent a greater threat to minority voting rights than noncovered jurisdictions.⁵⁰ Although presidential election returns themselves do not say anything of relevance to most of the core questions of minority voting rights, analyzing them serves two purposes for the current debate. First, it allows us to investigate the claim made by VRA opponents that the 2008 election represented a sea change in the preferences and behavior of voters from different racial groups in different regions.⁵¹ Second, it allows us to assess the claims made as part of the 2006 reauthorization of the VRA concerning persistent racial polarization in the electorate of the covered jurisdictions.

⁴⁹ 42 U.S.C. § 1973c (2006). In the 1975 amendments to the VRA, Congress expanded the definition of tests or devices to include the provision of English-only ballot materials in jurisdictions with large non-English-speaking populations. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, SECTION 4 OF THE VOTING RIGHTS ACT (July 25, 2008), available at http://www.justice.gov/crt/voting/misc/sec_4.php.

⁵⁰ See *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009) ("The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.").

⁵¹ See ABIGAIL THERNSTROM, *VOTING RIGHTS AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 200-01* (2009); Barnes, *supra* note 8; Liptak, *supra* note 8; Toobin, *supra* note 8.

Although this Article focuses on election returns, we should not pretend that such analysis represents the touchstone for evaluating whether Congress has exceeded its authority under the enforcement clauses of the Fourteenth or Fifteenth Amendments. In its consideration of previous versions of the VRA, the Court asked whether the legislation was a "rational means" of preventing or remedying violations of minority voting rights.⁵² The legislative record supporting each incarnation of the VRA has focused on actual examples of racial discrimination, intimidation, and violation of minority voting rights, as well as data concerning minority voter turnout and officeholding.⁵³ However, the Court's decision in *City of Boerne v. Flores*⁵⁴ established that Congress's power to enforce the guarantees of the Fourteenth Amendment only extends to laws that were "congruen[t] and proportional[]" to the constitutional violations that the laws attempt to prevent or remedy.⁵⁵ Under this new standard, the question arises whether Congress must justify the coverage formula by distinguishing between covered and noncovered states in their relative rates of violation of minority voting rights.

The evidence of racial differences in voting patterns is useful and interesting (if not constitutionally determinative) for the current debate over the coverage formula for several reasons. First, it allows for a systematic comparison between covered and noncovered states along a dimension that should not be directly affected by the existence of section 5 itself. One problem confronting those who would gather data regarding the relative position of jurisdictions in their protection of minority voting rights is that section 5 deters and prevents covered jurisdictions from committing the kinds of constitutional violations that would constitute the best evidence for their selective coverage under the VRA.⁵⁶ In other words, if the VRA works as intended, the Department of Justice (DOJ) will prevent the emergence of discriminatory barriers to registration and voting, and no constitutional differences should appear between the election law regimes of the covered and noncovered jurisdictions.

⁵² *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

⁵³ See Persily, *supra* note 11, at 192–207.

⁵⁴ 521 U.S. 507 (1997).

⁵⁵ *Id.* at 520.

⁵⁶ This catch-22 is what Chief Justice Roberts at oral argument in *NAMUDNO* described as the elephant whistle problem. "You know, I have this whistle to keep away the elephants," Roberts said rhetorically. "Well, there are no elephants, so it must work." Jim Galloway, *With John Lewis in the Pews, Chief Justice John Roberts Compares Voting Rights Act to "An Elephant Whistle,"* ATLANTA J.-CONST., Apr. 29, 2009, <http://blogs.ajc.com/political-insider-jim-galloway/2009/04/29/with-john-lewis-in-the-pews-chief-justice-john-roberts-compares-voting-rights-act-to-an-elephant-whistle>.

Race-based voting patterns are largely exogenous to the legal regime — that is, they should not be directly affected by section 5 enforcement⁵⁷ — but might shed light on differential risks to minority voters were the section 5 regime to be removed. By themselves, these patterns do not point to unconstitutional state action, but they signal the relative potential for minority voters to elect their preferred candidates. Also, when candidate preferences coincide with racial group membership, there is greater risk that incumbent-protecting or partisan election-related behavior on the part of the legislature will have race-based effects. To put it concretely, when those who write election laws under such circumstances succumb to the tendency to enact regulations that benefit their electoral prospects, they enact laws with discriminatory effects. If blacks all vote Democrat and whites all vote Republican, for instance, an election law that seeks to perpetuate Republican control will often have discriminatory effects, even if it is not unconstitutional. The likelihood that partisan or even merely incumbent-entrenching behavior will have a disparate impact on voting rights is greater under conditions of race-based voting.

This last point poses obvious dangers as a constitutional justification for selective coverage of areas that experience racial differentiation in voting. These issues are reminiscent of the concerns related to the role of partisan voting in vote dilution litigation under section 2. If racially differential voting patterns on their own could justify singling out a jurisdiction for special treatment, then party-line voting could doom a jurisdiction to coverage until the very late date when parties and racial groups realign. Perhaps that should not make a constitutional difference: such risks of discriminatory state action fueled by partisan concerns either exist or do not exist, regardless of “cause.” If Congress’s decision to single out jurisdictions represents, at least in part, an assessment of the relative risks to minority voters in different places, then the mixed motives of those who may draft election laws do not bear on that risk assessment. Nevertheless, because constitutionally impermissible race-based discrimination requires intent — that is, discrimination “‘because of,’ not merely ‘in spite of,’”⁵⁸ its race-

⁵⁷ It is possible, of course, that the existence of section 5 itself could diminish racial polarization in the electorate. Insofar as DOJ enforcement of section 5 has led to the creation of districts where minority candidates can be elected, perhaps white voters, over time, have become accustomed to and comfortable with minority-preferred candidates. Indeed, the higher rates of white support for minority incumbents, as opposed to minority candidates in open seats, might suggest precisely that dynamic. See Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1394–98 (2001). However, even if this argument is valid, voting patterns, as opposed to voting laws, still will be less affected by the deterrence provided by the mere presence of section 5.

⁵⁸ *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

based effects — partisan voting behavior that leads to partisan election laws does not necessarily constitute unconstitutional state action.⁵⁹

At a more fundamental level, the relevance of the 2008 election to the VRA's constitutionality depends on whether one believes group-based voting behavior and election results, in general, are relevant to the constitutionality of the coverage formula. If the only relevant pieces of evidence to bolster the constitutionality of the coverage formula are, for this Court, instances of unconstitutional discrimination, then mere individual voting behavior does nothing to help the constitutionality of section 5. As Justice Thomas's separate opinion in *NAMUDNO* maintained, "[R]acially polarized voting is not evidence of unconstitutional discrimination [and] is not state action"⁶⁰ Although voting may occur in a state-structured and regulated environment (that is, the polling place), the choices made are personal ones to the voter, not efforts by the state. Even if one might view the state as enabling discrimination against either minority voters who get outvoted or their preferred candidates who lose, an individual's or group's vote choice, even based on racial animus, does not itself violate the Constitution. If Congress's authority under the enforcement clauses of the Fourteenth and Fifteenth Amendments, for this Court, extends only to remedying or preventing actual constitutional violations (an open question to be sure, especially under the Fifteenth Amendment), then persistent polarized voting by itself does not constitute a sufficient record for an exercise of congressional power in this realm.

At the same time, a lack of polarized voting does not speak to whether racial minorities face increased obstacles or unconstitutional conditions at the polls. Even if the same percentages of whites and African Americans across the country vote for the same candidates, for instance, the relative prevalence of discriminatory voting laws in some areas could still justify a geographically targeted voting rights law. If, in the 2008 election, candidate preferences were completely uncorrelated with race, it still could be possible that minority voters in certain jurisdictions faced discriminatory barriers to voting.

For these reasons, we view the election data we analyze for the remainder of this Article as primarily a response to the argument that lessened racial polarization undermines the justification for the cover-

⁵⁹ We should emphasize that, for us, the questions surrounding the constitutionality of the VRA are easy ones. See Persily, *supra* note 12, at 260–61 (arguing that the reauthorized VRA should be considered constitutional according to a lowered standard for exercises of congressional power to protect against racial discrimination in voting rights).

⁶⁰ *NAMUDNO*, 129 S. Ct. 2504, 2526 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (citation omitted); see also *United States v. Morrison*, 529 U.S. 598, 621 (2000) (striking down the Violence Against Women Act as exceeding Congress's Enforcement Clause authority in part because it regulated private behavior).

age formula,⁶¹ rather than as support for the suggestion that the data, on their own, justify its constitutionality.⁶² For those advocates who would recraft the coverage formula to pay particular attention to the jurisdictions with higher rates of racial differentiation in voting, the data that follow indicate the jurisdictions of concern. There can be no doubt that race-based patterns in voting behavior are greater in the currently covered jurisdictions — on average.⁶³ Yet the categories of currently covered and noncovered are not coterminous with those jurisdictions with the highest rates of race-based voting.⁶⁴ If voting patterns were to form the exclusive justification for coverage — something no one has suggested — then the list of covered states would be somewhat different.

II. RACIAL DIFFERENCES IN VOTING PRIOR TO 2008

Racial and regional differentiation in presidential vote choice are familiar characteristics of American electoral politics. The two parties and their nominees have always been able to rely on some groups and regions more than others, even if allegiances have changed (sometimes radically) over time. Some of these patterns of racial and regional differentiation in vote choice held true for the 2008 election, while others were disrupted.

The underlying story concerning these patterns is familiar.⁶⁵ The flight of African Americans away from the GOP, with which they had largely affiliated since the end of slavery, began to occur during Franklin Roosevelt's presidency.⁶⁶ While Roosevelt won only 23% of the black vote in 1932, the popularity of the New Deal among blacks led to a realignment such that by 1948 Truman would win 70% of the black vote.⁶⁷ Although Southern blacks may have preferred the largely absent Republican Party, most were prevented from voting altogether.

⁶¹ See THERNSTROM, *supra* note 51, at 200–02.

⁶² See Clarke, *supra* note 33, at 84–85.

⁶³ See Table 5.

⁶⁴ See Table 9.

⁶⁵ See generally NELSON W. POLSBY, *HOW CONGRESS EVOLVES* (2004) (describing the rise of the Republican party in the South due to Northern migration and conversion of Dixiecrats); Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation, in QUIET REVOLUTION IN THE SOUTH* 335, 335–77 (Chandler Davidson & Bernard Grofman eds., 1994) (detailing the effect of the VRA on white and black voting behavior).

⁶⁶ See ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD E. STOKES, *THE AMERICAN VOTER: AN ABRIDGEMENT* 92–93 (1964); NANCY J. WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR* 180 (1983).

⁶⁷ See David Greenberg, *The Party of Lincoln . . .*, SLATE, Aug. 10, 2000, <http://slate.msn.com/id/87868>.

er.⁶⁸ The legacy of Lincoln held sway over Southern whites, which made the South solid for Democratic nominees through the 1950s.⁶⁹

Since Lyndon Johnson's landslide victory in 1964 (followed by the passage of the VRA in 1965), the Democrats have not won a majority of the white vote nationally in a presidential election, due in large part to their losses among Southern whites.⁷⁰ Republican nominees have consistently won a majority (or plurality) of the white vote.⁷¹ The Democratic nominee has repeatedly won a majority of the vote from racial minorities — overwhelming majorities among African Americans and slimmer, but consistent majorities among Hispanics.⁷² The magnitude of these racial differences in vote choice varies according to region. In particular, the share of whites in the covered jurisdictions, especially in the South, who have voted for Democratic nominees has been smaller than the share outside the covered jurisdictions or the South.⁷³ As a result, given the relative consistency of the minority vote across the nation, the gap between whites and minorities is more substantial in the covered states.

A. Presidential Election Exit Polls, 1984–2004

Since the reauthorization of section 5 of the VRA in 1982,⁷⁴ these patterns of vote choice at the presidential level have been relatively stable. Table 1 presents the average share of the two-party vote received by Democratic candidates according to exit polls from 1984 through 2004 as broken down by race, party, and covered status. The

⁶⁸ See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 517 (Univ. of Tenn. Press 1984) (1949) ("So few have been Negro voters in the South that to estimate their number seems futile.").

⁶⁹ See EARL BLACK & MERLE BLACK, *THE VITAL SOUTH* 4–5 (1992).

⁷⁰ See *id.* at 149–58 (discussing Goldwater's strategy of appealing to Southern whites disaffected with the Democratic party).

⁷¹ Because of the Perot candidacy in 1992 and 1996, no party won a majority of the white vote. Exit polls began in 1976. Data on voting patterns of racial groups before then are available through the American National Election Studies (ANES). Using the Cumulative Data File, 1948–2004, which combines all of the ANES surveys, we calculate the percentage of whites voting Democratic in each of the presidential elections from 1948 to 2004. UNIV. OF MICH., CTR. FOR POLITICAL STUDIES, *THE NATIONAL ELECTION STUDIES, 1948–2004 ANES CUMULATIVE DATA FILE* (2005), <http://www.electionstudies.org/studypages/cdf/cdf.htm>. According to the ANES data the percentage of whites who voted Democratic in each election is estimated to be: 51% in 1948, 40% in 1952, 39% in 1956, 48% in 1960, 64% in 1964, 36% in 1968, 30% in 1972, 46% in 1976, 33% in 1980, 35% in 1984, 39% in 1988, 41% in 1992, 46% in 1996, 46% in 2000, and 41% in 2004. According to the ANES data, the percentage of minorities (all combined) who voted Democratic in each election is estimated to be: 73% in 1948, 62% in 1952, 66% in 1956, 73% in 1960, 99% in 1964, 91% in 1968, 77% in 1972, 80% in 1976, 80% in 1980, 71% in 1984, 78% in 1988, 74% in 1992, 80% in 1996, 69% in 2000, and 70% in 2004.

⁷² See *id.*; Table 1; Figure A.

⁷³ See Table 1.

⁷⁴ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (2006)).

TABLE 1. THE RACIAL GAP IN VOTING FOR DEMOCRATIC NOMINEE, PRESIDENTIAL EXIT POLLS, 1984-2004⁷⁵

Group	Covered	Noncovered + Partially Covered	Nation
White	28	42	39
Black	84	84	84
Latino	61	64	63
<i>Whites</i>			
Democrats	72	79	78
Republicans	4	9	8
Independents	28	42	40
<i>Difference</i>			
Black-white	56	42	45
Latino-white	33	22	24

⁷⁵ These data were gathered from national exit polls archived at the Inter-University Consortium for Political and Social Research (ICPSR), <https://www.icpsr.umich.edu/icpsrweb/ICPSR/access/series.jsp> (last visited Feb. 27, 2010). All calculations were performed using sample weights provided by the exit poll in the relevant file. In all ICPSR files, the weight variables are labeled WGT. The exit poll results are weighted to reflect the complexity of the sampling design and to take into account the different probabilities of selecting a precinct and of selecting a voter within each precinct. The weights are defined such that the exit poll results equal the final tabulated vote within geographic regions of the states or nation. Calculations were made for each state using the within-state weights provided by the exit polls. Next, aggregate calculations were made for VRA and non-VRA regions, weighting each state by the population of interest (i.e. Whites, Blacks, Hispanics, White Democrats, White Republicans, and White Independents) residing in that state.

states with some covered counties or municipalities do not differ in any meaningful way from those that are totally noncovered, so we combine the two. In the noncovered states with covered municipalities, only a minority of the population — in most such states, a very small minority — is actually covered. North Carolina is the partially covered state with the greatest share (36%) of its population covered. New York is second with 28% of its population covered. In all other partially covered states, the share of the state's population that is covered is negligible. We also adopt the DOJ's practice of including Virginia as a fully covered state, even though several of its municipalities (amounting to a very small share of its total population) have bailed out from coverage.⁷⁶

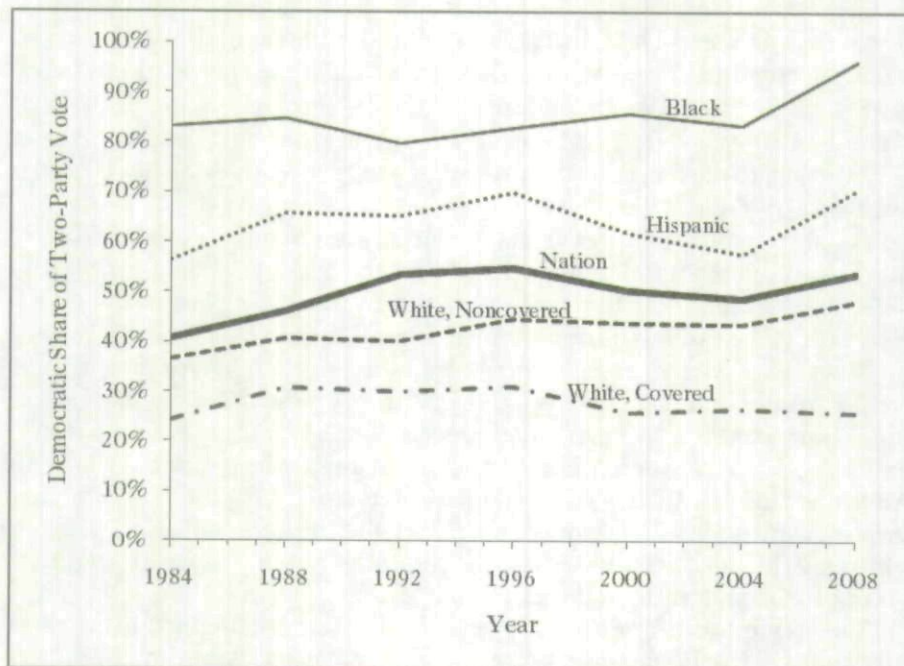
As noted above, whites in the covered jurisdictions voted distinctly more Republican than whites in the noncovered jurisdictions. Only 28%, on average, said they voted for the Democratic nominee — fourteen percentage points lower than their counterparts in the noncovered jurisdictions, where 42% of whites on average reported voting for Democratic nominees. This is thirty-three percentage points lower than Democratic nominees' average vote share among Latinos (61%) and fifty-six percentage points lower than the average among African Americans (84%) in the covered jurisdictions. Regardless of whether they live in covered or noncovered jurisdictions, racial minorities, in contrast, do not seem to differ substantially in the share that report voting for Democratic nominees.

The regional differences between whites occur among all partisan subgroups. In the covered states, whites of every partisan affiliation (or nonaffiliation) were less likely than whites in the noncovered states to vote for the Democratic nominee. The difference was most stark among Independents, who exhibit a fourteen percentage point gap (42% versus 28% support in the covered areas). However, the gap is seven percentage points among white Democrats and five percentage points among white Republicans between the covered and noncovered states. In sum, differences in whites' voting preferences across covered and noncovered areas cannot be attributed wholly to party. Republican identifiers, Democratic identifiers, and especially Independent identifiers in covered jurisdictions vote for Republican candidates at higher rates than do their counterparts in noncovered jurisdictions. Of course, it is well known that Southern white Democrats have been voting for Republican presidential candidates for many decades now.⁷⁷ Whether these voting patterns might be attributable to their ideologi-

⁷⁶ See CIVIL RIGHTS DIV., *supra* note 10 (listing as covered states: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia).

⁷⁷ See sources cited *supra* note 65.

FIGURE A. DEMOCRATIC CANDIDATE'S SHARE OF THE TWO-PARTY VOTE, NATIONAL EXIT POLLS, 1984-2008



cal conservatism, not accurately or completely gauged by their self-identification with a party, is a topic we address later in the Article. At least in the 2008 election, it appears that some variable not captured by either partisanship or ideology still accounts for the differences in vote choice between the covered and noncovered states.

The race-based patterns in presidential vote choice have been remarkably stable over the past two decades. Figure A graphically depicts the share of the two-party vote received by Democratic nominees, broken down by racial group, from 1984 to 2008. Blacks have been most supportive of Democratic candidates, followed by Hispanics. Republicans won a majority or plurality of the white vote in every election from 1984 to 2008. That pattern holds true in covered and noncovered jurisdictions, but the whites in covered jurisdictions vote more heavily Republican than those in noncovered jurisdictions. The gap between whites in the noncovered and covered states has varied between 10 percentage points in 1988 and 22 points in 2008. In 1996 Bill Clinton received 31% of the white vote in the covered states, the highest received by a Democratic nominee during this period. Walter Mondale received the lowest, with 24% of the vote in 1984. For the most part, it appears Democrats have been doing steadily better among whites in the noncovered states over time, while support among whites in the covered states has remained largely flat.

B. The 2004 Election

We explore in greater detail the results of the 2004 election because its close proximity to the 2008 election allows it to serve as a benchmark for comparison. With a few exceptions, the 2004 results are largely similar to the averages from 1984 to 2004. We present both the cross-tabulations from the exit polls and regressions that analyze aggregated election returns. The data, regardless of presentation, support the same result. As Table 2 depicts, the 2004 exit polls reveal that John Kerry did somewhat worse than previous Democratic nominees among Hispanics (by about three percentage points) and did somewhat better than previous Democratic nominees among whites and African Americans (by about two to three percentage points). Relative to the average, he lost among whites in the covered jurisdictions but made up for it among whites in the noncovered jurisdictions. He lost ground among Hispanics regardless of coverage status, but his loss was more pronounced in the covered states. Compared to the partisan structure of the white vote received by previous Democratic nominees, he did substantially better among white Democrats and Independents and slightly worse among white Republicans. This was true for both the covered and noncovered states.

In terms of their reported vote in the 2004 election, only Hispanics and whites exhibited significant differences based on whether they

TABLE 2. RACIAL GAP IN 2004 PRESIDENTIAL ELECTION⁷⁸

Group	Covered	Noncovered + Partially Covered	Nation
White	26	44	41
Black	88	87	87
Latino	50	63	60
<i>Whites</i>			
Democrats	83	86	86
Republicans	3	7	6
Independents	34	51	48
<i>Difference</i>			
Black-white	61	43	46
Latino-white	24	19	18

TABLE 3. RELATIONSHIP BETWEEN COUNTY RACIAL MAKEUP
AND PRESIDENTIAL VOTE, 2004⁷⁹

	Covered	Noncovered
Black and Hispanic percentage of county population	0.534 (0.021)**	0.374 (0.013)**
Constant	0.236 (0.009)**	0.421 (0.004)**
N	860	2254
R-squared	0.42	0.26

* $p < 0.05$, ** $p < 0.01$. Standard errors in parentheses.

⁷⁸ The data for this table are also available at ICPSR. INTER-UNIV. CONSORTIUM FOR POLITICAL AND SOC. RESEARCH, NATIONAL ELECTION POOL GENERAL ELECTION EXIT POLLS, 2004, <http://dx.doi.org/10.3886/ICPSR04181> (last visited Feb. 27, 2010). Small discrepancies in the "Difference" calculations are due to rounding.

⁷⁹ Election returns were gathered by the authors from official state election returns. Data about the racial composition of counties in 2006 were taken from U.S. Census Bureau estimates for 2006. See U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS, <http://quickfacts.census.gov/qfd/index.html> (last visited Feb. 27, 2010).

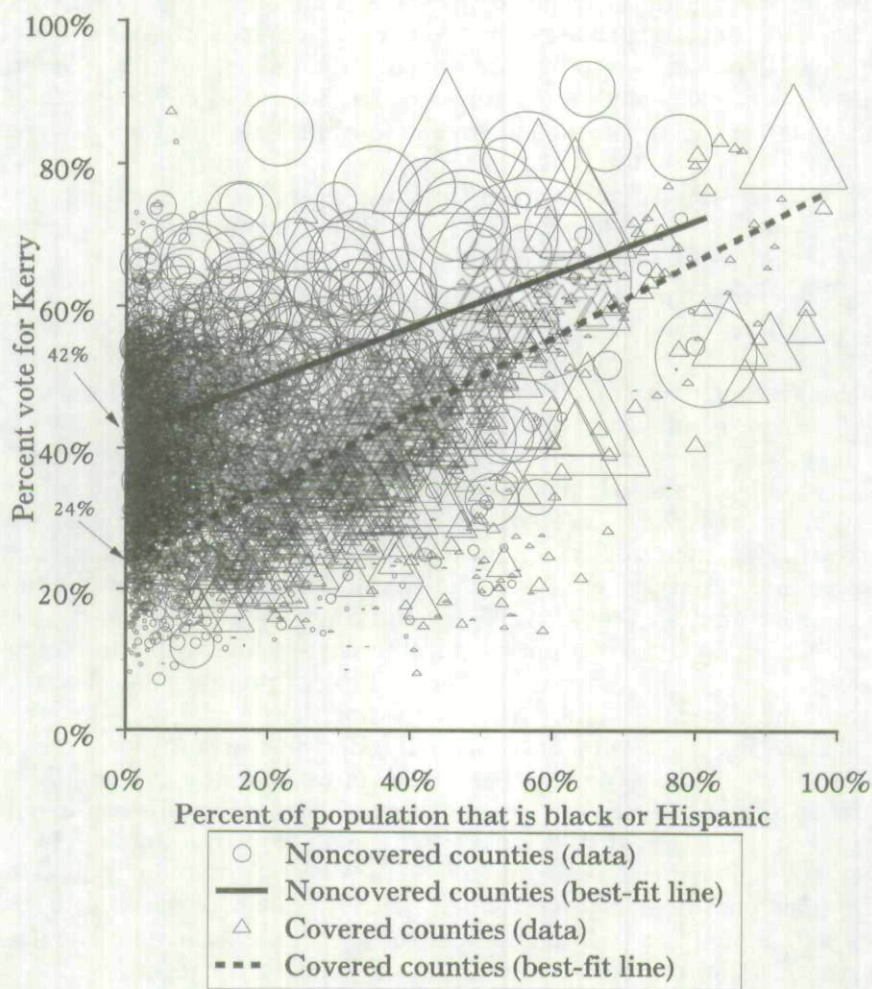
lived in the covered states. Twenty-six percent of whites in the covered states reported voting for Kerry, but 44% of whites in the noncovered states said they did so. The 2004 election also demonstrated a remarkable lack of cohesion among Hispanics, especially in the covered states. Only half of Hispanics in the covered states reported voting for Kerry, while 63% in the noncovered states did so. This lack of cohesion was a significant departure from Hispanic voting patterns between 1984 and 2004, where, on average, the covered and noncovered gap for Hispanics was only three percentage points. African Americans, in contrast, voted about the same, regardless of coverage status: 88% voted for Kerry in the covered states and 87% in the noncovered states.

The aggregated returns from the 2004 election are consistent with the exit poll data. Table 3 and Figure B present in different formats the election results by county, according to that county's racial make-up. Presenting the data in this way allows us to account for the covered counties in noncovered states, something we cannot do reliably with the state-based exit polls. Noncovered counties that contain some covered municipalities (as in New Hampshire) are considered not covered because a small percentage of the population of the county resides in the covered municipality. Figure B plots the relationship between a county's black plus Hispanic percentage and the share of the vote John Kerry received. The size of the triangles or circles in Figure B corresponds to the total voter turnout in the county, with triangles referring to counties covered by the VRA and circles referring to counties not covered by the VRA. The solid line is the best-fit regression line for the noncovered counties, and the dashed line is the best-fit regression line for the covered counties. Table 3 presents the data that are graphically expressed by those regression lines.

Figure B clearly (and unsurprisingly) demonstrates the positive relationship between a county's percentage of racial minorities and the share of the vote received by John Kerry. The two statistics of note are the intercepts with the y axis and the slope of the lines. The y-intercept denotes the share of voters in a county without blacks or Hispanics who tended to vote for Kerry. It is helpful in isolating the expected share of the white vote that the candidate received. The data suggest that, in the noncovered counties, John Kerry received 42% of the white vote, whereas he received only 24% of the white vote in the covered jurisdictions. The results are quite close to those found in the exit polls.

As is also clear from the data, the line for the covered counties is steeper than that for the noncovered counties. The slope of the line for the covered jurisdictions is 0.534 and for the noncovered jurisdictions is 0.374. Moreover, the R-squared value is higher as well for the covered jurisdictions (0.42 compared to 0.26). This suggests that Kerry's vote share in covered counties is better explained by its minority per-

FIGURE B. RELATIONSHIP BETWEEN 2004 PRESIDENTIAL VOTE AND NONWHITE POPULATION SHARE, COVERED AND NONCOVERED COUNTIES⁸⁰



⁸⁰ Sizes of data tokens are proportionate to the number of voters turning out in the county. See *supra* note 79 for an explanation of the data used in Figure B as well as in Table 3. Regression lines are based on estimates reported in Table 3.

centage than is the case in the noncovered jurisdictions. For each additional percent of black or Hispanic population in a covered county the Kerry vote share in the covered counties increased by 0.53 percentage points, and in the noncovered counties it increased by 0.37 percentage points.

The data from the 2004 election, as with the aggregated data since 1984, point to the regional differences in the relationship between race and vote choice. Of course, the gap between whites and racial minorities is due both to the high share of the minority population willing to vote for the nominee and to the relatively lower share of whites willing to vote for him. An increase in racial differences can occur because of both a decrease in the white vote share and an increase in the vote share of racial minorities.

III. RACE AND VOTE CHOICE IN THE 2008 ELECTION

Barack Obama's victory in 2008 proved a very simple fact — a black candidate can win in the majority-white constituency that is the national presidential electorate. Some viewed his election as posing a challenge, therefore, to the philosophical and perhaps constitutional foundations of the Voting Rights Act.⁸¹ If his election indicates decreasing racial polarization in the electorate, it might lower the prospects for success of potential plaintiffs in section 2 vote dilution cases. Moreover, if Obama's relative success among whites was uniform across the country, the 2008 election might bolster the arguments of critics concerning the irrationality or unconstitutionality of the geographically targeted coverage formula of section 5. We find, however, that the magnitude of race-based differences in voting preferences increased across the nation in the 2008 election, largely due to the increase in cohesive support of racial minorities for Obama. Obama did better than Kerry among whites in the noncovered states, but about the same as Kerry among whites in the covered states. Even within these two classes of jurisdictions, there is considerable diversity among the voting preferences of whites. However, controlling for demographics, partisanship, and ideology explains the differences between whites in the covered and noncovered jurisdictions in 2004, but not in 2008. In other words, regardless of whether one sees racial polarization in the simple correlation between race and vote choice (as did the plurality in *Gingles*) or would require a more nuanced analysis that controls for other potential explanations for racial divergence in voting (as have several circuits), states covered under the Voting Rights Act gen-

⁸¹ See, e.g., Thernstrom & Thernstrom, *supra* note 4; George Will, *Revise the Voting Rights Act*, REAL CLEAR POLITICS, Jan. 19, 2009, http://www.realclearpolitics.com/articles/2009/01/revise_the_voting_rights_act.html.

erally exhibit higher rates of racial polarization in presidential voting patterns.

In one very obvious way, the 2008 election departed from the dominant pattern of presidential elections since 1968: the Democratic nominee won. Both Presidents Carter and Clinton won during that period as well, but Republicans had won seven of the previous ten presidential contests, usually by large margins.⁸² Republican victories almost always included wins of the South and the white vote nationwide by a substantial margin.⁸³ They always lost the black and Hispanic vote, but their share of the minority vote varied by close to twenty percentage points depending on the election.⁸⁴

In the immediate aftermath of the 2008 election, the most dramatic developments appeared to be the “new” states Obama won: for example, Virginia, North Carolina, Indiana, and Colorado. One could reasonably infer from victories in that diverse group of states that the Democrats had made inroads into previously Republican strongholds in the South and elsewhere, particularly among white voters. A rising, nationally uniform pro-Democratic (or anti-Republican) tide, it would seem, lifted Obama to victory in certain states that may have not appeared winnable in 2004 when the conditions and candidates seemed to favor the Republicans.

Once the exit poll and other survey data became available, however, the picture of the 2008 electorate appeared more complicated. Obama did better in some states but worse in others, as compared to John Kerry four years earlier. Moreover, the change in the composition of the electorate seemed as much, if not more, responsible for Obama’s victory as the conversion of Bush voters. Higher black and Hispanic turnout, coupled with relatively lower white turnout, plus Obama’s increase over 2004 in his vote share among minorities, were key to his victory.⁸⁵

Both of these features of the 2008 election are relevant to questions underlying the VRA. The uneven geographic distribution of white supporters of Obama highlights where racial gaps in voting patterns might be narrowing and where they might be growing. Even conceding the uniqueness of presidential elections and the Obama candidacy, the changes between 2004 and 2008 may highlight areas of changing racial polarization affecting potential plaintiffs in section 2 lawsuits. Similarly, the high turnout of minorities and the changing composition

⁸² Six of ten if one counts the 2000 presidential election as a Democratic win, given Al Gore’s win of the popular vote.

⁸³ See Figure A; Dave Leip, Dave Leip’s Atlas of U.S. Presidential Elections, <http://uselectionatlas.org/RESULTS> (last visited Feb. 27, 2010).

⁸⁴ See Figure A.

⁸⁵ See Tables 4 & 5.

of the electorate may hint at a future where, even in some racially polarized environments, minorities' increasing share of the electorate can counteract any tendency among whites to vote against minorities' preferred candidates.

A. National Results

Barack Obama won the 2008 general election because he won a larger share of both the white vote and the minority vote than John Kerry did four years earlier. In addition, the composition of the electorate differed from four years earlier, as racial minorities comprised a larger percentage of the voters who turned out. This combination of increased turnout and vote share — which was not constant across regions, states or groups — propelled Obama to victory.

The 2008 electorate was less white and more Democratic than it was in 2004, as Table 4 demonstrates. Ten million more people voted in 2008 than in 2004 (132.6 million in 2008 and 122.5 million in 2004).⁸⁶ However, the white share of the electorate decreased from 78% to 74%, while the African American share increased 2 points from 11% to 13%, and the Hispanic share increased from 8% to 9%. Among whites, Republicans dropped off dramatically — 4 points down to 29% of the 2008 electorate. White Democrats remained constant at 24%, while white Independents increased 1 point to become 22% of the electorate. In other words, the increase in the Democratic share of the electorate was due almost completely to increased turnout among minorities, and the decrease in the Republican share of the electorate was due to the drop off of whites.

Comparing the 2008 election exit polls to those from the 2004 election allows us to get a sense of what made the difference for the Democratic nominee. Obama received ten million more votes than Kerry. Approximately 70% of Obama's gain in votes over Kerry can be attributed to black and Hispanic voters. Obama received 4.3 million more votes from African Americans than did Kerry. Total turnout among blacks rose from 2004 to 2008, and they voted more solidly for the Democrats in 2008 than they did in 2004. Obama won 96% of the black vote (a 9 point increase from 2004). He also did markedly better among Hispanics than Kerry. Obama received 2.7 million more votes from Hispanics, from whom he won 70% of the vote. Kerry, by contrast, won only 59% of the Hispanic vote in 2004. Whites accounted for 3 million additional votes for the Democrats in 2008. In other words, although Obama received 3 million more white votes than Kerry (which translates into a three percentage point increase among

⁸⁶ See Michael McDonald, United States Elections Project, Voter Turnout, http://elections.gmu.edu/voter_turnout.htm (last visited Feb. 27, 2010).

TABLE 4. CHANGE IN THE COMPOSITION
OF THE ELECTORATE 2004–2008⁸⁷

<i>Change in Racial Composition of the Electorate</i>									
Race	Covered			Noncovered			Nation		
	2008	2004	diff	2008	2004	diff	2008	2004	diff
White	68	69	-1*	75	80	-5*	74	78	-4*
Black	21	19	2*	11	9	2*	13	11	2*
Hisp.	10	9	1*	9	7	2*	9	8	1*
Asian	1	1	0	2	2	0	2	2	0
<i>Change in Partisan Composition of the Electorate</i>									
Party	Covered			Noncovered			Nation		
	2008	2004	diff	2008	2004	diff	2008	2004	diff
Dem.	36	34	2*	40	38	2*	39	37	2*
Rep.	37	43	-6*	31	36	-5*	32	37	-5*
Ind./Other	27	23	4*	29	27	2*	29	26	3*
<i>Whites by Party, as a Percentage of Entire Electorate</i>									
Party	Covered			Noncovered			Nation		
	2008	2004	diff	2008	2004	diff	2008	2004	diff
Dem.	13	15	-2*	26	26	0	24	24	0
Rep.	33	38	-5*	27	32	-5*	29	33	-4*
Ind./Other	20	17	3*	23	22	1*	22	12	10*

* p<0.01.

⁸⁷ Exit poll data for 2004 come from the ICPSR, *supra* note 78. Exit poll data for individual states for 2008 come from CNN. CNN, ELECTION CENTER 2008, LOCAL EXIT POLLS, <http://www.cnn.com/ELECTION/2008/results/polls/#ALPoop1> (last visited Feb. 27, 2010).

whites from 41% to 44%), most of the difference between the 2004 and 2008 elections can be explained by minority votes. Obama did better than Kerry in both total votes from minorities and percent of votes from minorities.

On the Republican side, McCain actually lost ground among minority voters compared to Bush. Four percent of black voters chose McCain in 2008, compared with 13% who chose Bush in 2004. Those figures imply that Bush received approximately 1.5 million votes and McCain just under 700,000 votes from blacks.⁸⁸ The total number of blacks who voted for the Republican standard-bearer actually fell from 2004 to 2008. A similar drop occurred among Hispanics. Bush won 40% of the Hispanic vote, and McCain captured just 30%. These figures suggest that Bush received 4.2 million votes from Hispanics, while McCain's Hispanic vote dropped to 3.7 million.⁸⁹ As the minority vote grew from 2004 to 2008, Republicans lost support in these communities not just as a percent of the total vote, but also in absolute numbers of minority votes.

B. The Section 5 Coverage Formula and the Results of the 2008 Election

Although rates of minority support for Obama were largely constant across the country, white support varied greatly by state and region. As a result, the size of the racial gap in support for Obama varied considerably as well. For the most part, but with some notable exceptions, white support was lower and the racial gap in Obama support was greater in states covered by the VRA. Indeed, in several states in the Deep South, Obama actually did worse among whites than Kerry. However, owing to increases in turnout by minorities and a decreased white share of the electorate, Obama did worse than Kerry in total share of the vote in only three states: Louisiana, Arkansas, and Tennessee.

Table 5 presents the exit poll data describing Obama's vote share in the covered and noncovered states and comparing it to 2004. One of the most striking statistics is the zero in the added vote share among whites in the covered jurisdictions between 2004 and 2008. Obama,

⁸⁸ These numbers were calculated from exit poll numbers reporting percentages of the electorate that were of each ethnic group in 2004 and 2008, see Table 4 & n.87, and total numbers of voters in 2004 and 2008 as reported by the Federal Election Commission, see FED. ELECTION COMM'N, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2009), available at <http://www.fec.gov/pubrec/fe2008/federaelections2008.shtml>; FED. ELECTION COMM'N, FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2005), available at <http://www.fec.gov/pubrec/fe2004/federaelections2004.pdf>.

⁸⁹ See sources cited *supra* note 88.

like Kerry, won only 26% of the white vote in the covered states. For some, this is remarkable because a black candidate did as well among whites in the covered states as a white Democrat four years earlier. Even as recently as 2004, almost no one would have predicted that a black presidential candidate might do as well as the most recent white candidate in the covered states.

The context of the 2008 election, however, was not the same as 2004, and, viewed in that light, Obama's failure to improve over Kerry's margin among whites in covered jurisdictions stands out. The economic collapse, the historic unpopularity of a sitting Republican president, and an enormous fundraising advantage provided a wind at the Democrats' back.⁹⁰ Indeed, outside of the covered states, Obama did much better. With the exception of whites in the covered states, Obama made statistically significant gains among all racial groups, regardless of coverage status. The added vote share was most pronounced among minorities, but he also gained 4 percentage points among whites in the noncovered states, where he won 48% of the white vote.

Partisan affiliation does not account fully for the differences between whites in the covered states and either their predecessors in 2004 or whites in the noncovered states. Obama received 75% of the white Democratic vote in the covered states⁹¹ — 7 percentage points less than Kerry, while remaining about constant among white Democrats in the noncovered states, where he won 85% of the white Democratic vote. For each partisan grouping of whites Obama did better in the noncovered states than in the covered states: 10 points better among white Democrats (85% versus 75%), 6 points better among white Republicans (10% versus 4%), and most significantly, 19 points better among white Independents (50% compared to 31%).

Not only did the covered jurisdictions differ from the noncovered jurisdictions in their levels of white support for Obama, but they also became more different in 2008 as the racial gap in the covered jurisdictions grew. The racial gap in voting preferences — that is, the percent of the white vote received by Obama minus the percent of the

⁹⁰ As Bullock and Gaddie show, in the covered states, white Democratic candidates in down-ballot races performed about 10 percentage points better than Obama, further suggesting that Obama performed worse than an average Democrat would have. See CHARLES S. BULLOCK III & RONALD KEITH GADDIE, *THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH* 364 (2009).

⁹¹ To arrive at the party-by-race totals for the covered and noncovered states requires weighting the state-based exit poll results by the share of each racial and partisan grouping. Because data as to the racial composition of each state's party membership are not available, we rely on the exit polls' assessments before combining states into the covered and noncovered groupings. Alternative weighting regimes, such as weighting simply according to census figures as to a state's racial composition, produce results with different magnitudes, although the basic story we tell here remains unaffected.

TABLE 5. RACIAL GAP IN PRESIDENTIAL VOTING PREFERENCES, 2008 EXIT POLLS⁹²

Group	Covered States		Noncovered States		Nation	
	2008 (%)	Change from 2004	2008 (%)	Change from 2004	2008 (%)	Change from 2004
White	26	0	48	4**	44	3**
Black	97	9**	96	9**	96	9**
Latino	67	16**	72	9**	70	11**
<i>Whites</i>						
Democrats	75	-7**	85	0	84	-1**
Republicans	4	1**	10	4**	9	3**
Independents	31	-3	50	-2	47	-2
<i>Difference</i>						
Black-white	71	9**	48	5**	52	6**
Latino-white	41	16**	24	5**	26	8**

* $p < 0.05$, ** $p < 0.01$. Small differences in the numbers in Tables 2 and 5 are due to rounding.

⁹² For an explanation of the ICPSR data used in Table 5, see *supra* note 87.

minority vote — increased nationally in 2008. The racial gap between blacks and whites grew 6 points (from 46 percentage points to 52), and the gap between Hispanics and whites grew 8 points (from 18 to 26 percentage points). However, the large racial gaps in preferences in the covered states grew even further in 2008, and grew more than the racial gap in the noncovered states. The 71 percentage point gap that separates blacks and whites in the covered states represents a 9 percentage point increase from 2004. By comparison, the noncovered states experienced a growth in the black-white gap of only 5 percentage points, such that 48 percentage points separate blacks and whites in the noncovered states. As a whole, the covered states became more different, not less, from the noncovered states with respect to the gap in voting preferences between the races.

Analysis of the aggregated election returns confirms the findings from the exit polls. Figure C and Tables 6, 7, and 8 present county-based results from the 2008 election to examine the relationship between a county's combined black and Hispanic share of the population and the share of the vote Obama received in the county.⁹³ As in our discussion above, the key statistics are the slope and intercept of the regression lines. The *y*-intercept for the covered counties remains about the same as it was in 2004, at 24%, signifying that about 24% of whites in the covered counties voted for Obama. The intercept for the regression line for the noncovered counties rises 4 percentage points from 2004 — from 42% to 46%. The line becomes steeper as well, and particularly so for the covered counties. The slope for 2008 for the covered counties is 0.635, compared to 0.415 for the noncovered counties — both slopes are higher than they are in Figure B.⁹⁴ The greater steepness of the regression line for the covered counties comes both from the “push” of Obama's increased vote share among minorities (raising the right side of the line) as well as the anchor of his share among whites, which keeps the intercept about where it was in 2004. As Table 6 depicts, the *R*-squared also increases substantially, suggesting that race became a better explanation for the presidential results. Almost half of the variance in presidential voting results between covered counties can be explained by their racial makeup.⁹⁵

⁹³ Because county-based results for Alaska are not available, we treat Alaska as one large county. Also, noncovered counties with covered municipalities are considered noncovered, given that such a small share of the population of the county is covered.

⁹⁴ Presidential vote data were gathered by the authors using official election return reports published by the states. The source of the county racial composition data is U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, <http://quickfacts.census.gov/qfd/download/DataSet.txt> (last visited Feb. 27, 2010).

⁹⁵ In Table 6A we present a regression table with “nonwhites” (instead of combined black and Hispanic population) as the independent variable and Democratic nominee's vote share as the dependent variable. The results are even more striking. The coefficient on the nonwhite percen-

TABLE 6. RELATIONSHIP BETWEEN COUNTY RACIAL MAKEUP AND PRESIDENTIAL VOTE, 2008⁹⁶

	Covered counties	Noncovered counties
Combined Black and Hispanic Percentage of County	0.635*** (0.022)	0.415*** (0.013)
Intercept	0.244*** (0.009)	0.461*** (0.004)
N	860	2,254
R-squared	0.496	0.307

***p<0.001. Numbers in parentheses are standard errors.

TABLE 6A. RELATIONSHIP BETWEEN COUNTY'S NONWHITE POPULATION SHARE AND PRESIDENTIAL VOTE, 2004 AND 2008

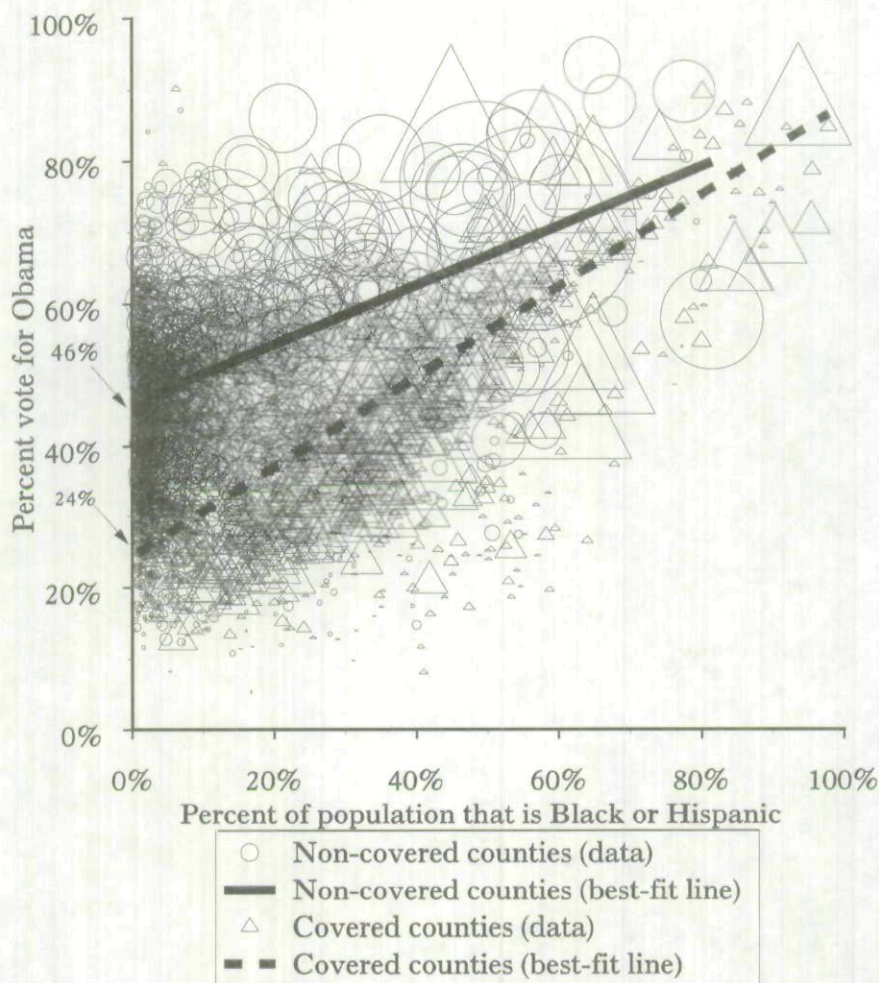
	2004		2008	
	Covered	Noncovered	Covered	Noncovered
Nonwhite percentage of county population	0.586** (0.021)	0.351** (0.011)	0.699** (0.021)	0.397** (0.011)
Intercept	0.191** (0.009)	0.404** (0.004)	0.189** (0.010)	0.441** (0.004)
N	860	2,254	860	2,254
R-squared	0.49	0.30	0.57	0.37

* p<0.05, ** p<0.01.

tage of a county grew for both the covered and noncovered counties between 2004 and 2008, although much more so for the covered counties. The increase in the coefficients and the increase in the R-squared between 2004 and 2008 reveal, again, that race played a greater role in 2008. The intercepts tell a story similar to that of the other regressions — a 4 percentage point increase in the noncovered counties and no change in the covered counties. However, the intercepts are much lower in the covered counties than they were for the regressions limited to blacks and Hispanics — 0.191 in 2004 and 0.189 in 2008. This translates into an estimate of approximately 19% support among whites in the covered counties for the Democratic nominees in 2004 and 2008.

⁹⁶ For an explanation of the data sources used in Tables 6 and 6A, see *supra* note 94.

FIGURE C. RELATIONSHIP BETWEEN COUNTY RACIAL MAKEUP AND PRESIDENTIAL VOTE, 2008



For ease of comparison of the 2004 and 2008 elections, we replot the regression lines from Figures B and C in Figure D. The intercept for the line for the covered jurisdictions remains the same between the elections, even while the line in 2008 indicates a rising vote share for Obama as the minority percentage in the county increased. For the noncovered jurisdictions, the shift upward occurs throughout the length of the line. This indicates that the increase in Obama's vote share occurred regardless of the racial makeup of the noncovered counties. To address the possibility that partisan preferences totally explain the differences between the covered and noncovered jurisdictions, we can control for a county's previous support for the Democratic nominee. Tables 7 and 8 control for the Kerry vote in explaining the Obama vote. Table 7 presents a multivariate regression, which includes only the percentage of the county voting for Kerry in 2004 and the percentage of the county that is white, in order to explain the county-based election results for 2008. Of course, most counties voted the way they did in 2004, and the results in 2004 are the best predictor of how a county would vote in 2008. Even controlling for the Kerry vote, however, does not erase the significance of the county's racial composition. A county's racial makeup remains significant for both the covered and the noncovered regressions, but the coefficient on the racial composition variable for the covered counties is about twice as large as it is for the noncovered counties (-0.152 versus -0.080).

Table 8 depicts the same phenomenon somewhat differently. The dependent variable there is the difference between Obama's vote share and Kerry's vote share, and the independent variable is the white percentage of the county. Again, the coefficient on the racial composition variable is about twice as large for the covered counties as it is for the noncovered counties (-0.111 versus -0.047). The R-squared for the regression for the covered counties is also higher, suggesting that, with respect to changes since 2004, racial composition explains more of the differences over time among the covered counties than among the noncovered counties. At the risk of belaboring the point, it is worth noting that these differences are, in no small measure, due to increased turnout and cohesion among minority voters, but the differences between whites in the covered and noncovered counties also contribute to the greater role played by race in the 2008 election.

Until this point, we have treated covered states and noncovered states as undifferentiated groups, without examining the diversity within these two classes of states. The state-level exit polls allow us to assess how well the current coverage formula captures states with the largest racial differences in vote preferences, the lowest levels of whites voting for Obama, or the greatest changes in white vote share for the Democratic nominee between 2004 and 2008. Table 9 provides all of these statistics.

FIGURE D. COMPARISON OF THE RELATIONSHIP BETWEEN
COUNTY RACIAL COMPOSITION AND DEMOCRATIC
VOTE SHARE, 2004 AND 2008

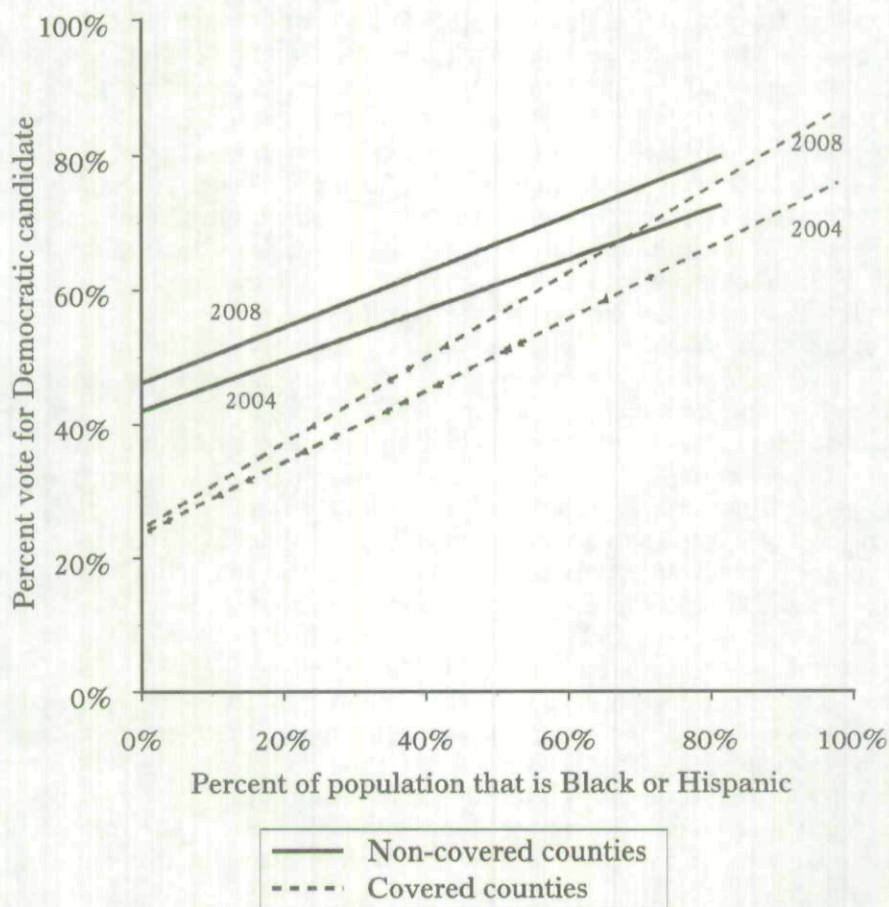


TABLE 7. RELATIONSHIP OF 2004 VOTE AND RACIAL MAKEUP TO 2008 VOTE AT COUNTY LEVEL⁹⁷

	Covered	Noncovered
Percentage vote for Kerry in 2004	0.930 (0.014)**	0.909 (0.007)**
Percentage of population that is white	-0.152 (0.012)**	-0.080 (0.005)**
Constant	0.165 (0.012)**	0.155 (0.006)**
N	860	2254
R-squared	0.930	0.92

* $p < 0.05$, ** $p < 0.01$. Standard errors in parentheses.

TABLE 8. PREDICTED CHANGE IN SUPPORT FOR DEMOCRATIC NOMINEE FROM 2004 TO 2008 BY WHITE PERCENTAGE OF COUNTY

	Covered	Noncovered
Percentage of county population that is white	-0.111*** (0.009)	-0.047*** (0.004)
Intercept	0.111*** (0.005)	0.086*** (0.003)
N	860	2,254
R-squared	0.159	0.06

*** $p < 0.001$. Standard errors in parentheses.

⁹⁷ For an explanation of the data sources used in Table 7, see *supra* note 94.

TABLE 9. RACE AND VOTE CHOICE BY STATE, 2008⁹⁸

State	% of Whites Voting for Obama	Change in White Vote Share from 2004	% of Total Vote Received by Obama	Change from 2004
Alabama	10	-9**	39	2
Mississippi	11	-3	43	3
Louisiana	14	-10**	40	-2
Georgia	23	0	47	6
South Carolina	26	4*	45	4
Texas	26	1	44	6
Oklahoma	29	0	34	0
Arkansas	31	-6**	39	-6
Utah	32	7**	34	8
Wyoming	33	4	33	4
Alaska	34	0	38	2
Idaho	34	4	36	6
Tennessee	34	0	42	-1
North Carolina	35	8**	50	6
Kentucky	36	1	41	1
Nebraska	40	7**	42	9
Virginia	39	8**	53	8
Arizona	40	-1	45	1
Kansas	40	6*	42	5
<u>South Dakota</u>	42	4*	45	7
West Virginia	44	2	43	0
<u>Florida</u>	43	1	51	4
Missouri	42	0	49	3
New Mexico	43	0	57	8

⁹⁸ States fully covered by the VRA appear in bold, partially covered states are underlined, and shaded rows denote states won by Obama. Exit poll data from 2004 and 2008 are from the ICPSR, see *supra* note 78. The cell entries for columns two and three are limited to votes cast by whites for the Republican and Democratic nominees, and the data for these entries are from 2008 state-level exit polls. See CNN, *supra* note 87. For the election results data in columns three and four, see DAVE LEIP, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/index.html> (last visited Feb. 27, 2010).

North Dakota	43	7**	45	9
<i>United States</i>	44	4**	53	5
Indiana	45	11**	50	11
Montana	46	6**	47	8
Nevada	46	2	55	7
Ohio	47	3	51	2
Maryland	49	4	62	6
Pennsylvania	48	3	54	3
New Jersey	49	4	57	4
Colorado	51	8**	54	7
Connecticut	53	1	61	7
Illinois	52	3	62	7
Iowa	52	3*	54	5
Michigan	52	7**	57	6
California	53	5**	61	7
New York	53	3	63	5
Delaware	54	9**	62	9
Minnesota	54	3*	54	3
New Hampshire	55	5**	54	4
Wisconsin	55	7**	56	6
Washington	57	4*	57	4
Oregon	59	9**	57	6
Maine	59	5**	58	4
Rhode Island	60	1	63	4
Massachusetts	60	1	62	0
Vermont	69	9**	67	8
Hawaii	72	14**	72	18
D.C.	88	8	92	3

* $p < 0.05$, ** $p < 0.01$.

All of the covered states are below the national average when it comes to the share of the white vote that Obama received. The six states with the lowest share of white voters voting for Obama are all covered states. They range from Alabama, where only 10% of whites voted for Obama, to Texas, where 26% voted for Obama. The three covered states not appearing at the lowest end of the white crossover voting spectrum are Alaska, Virginia, and Arizona. It should also be noted that the five states with the lowest levels of white crossover voting and the largest gap between whites and African Americans in terms of Obama's vote share are also the states with some of the largest African American population shares. These five states are among the top six states in terms of the share of the population that is African American. According to the 2006 Census population estimates, Mississippi (37.1%), Louisiana (31.9%), Georgia (29.6%), Maryland (28.8%), South Carolina (28.6%), and Alabama (26.3%) have the highest African American population shares of any state.⁹⁹ All but Maryland are covered by section 5 of the Voting Rights Act.

The changes between 2004 and 2008 are also revealing. In three of the covered states, the white vote for the Democratic presidential nominee decreased from 2004 to 2008. In Alabama and Louisiana the decrease was substantial and statistically significant. In Mississippi, white support for the Democrat fell 3 percentage points, but that drop was not statistically significant. In two other covered states, Obama did better than Kerry among whites. The share of white voters in South Carolina and Virginia willing to vote for the Democrat increased by 4 and 8 percentage points, respectively, between 2004 and 2008.

In a large number of the noncovered states, Obama made significant gains among white voters. These states include some, such as North Carolina, which are partially covered, where Obama received 8 percentage points more of the white vote than Kerry did. In only one noncovered state, Arkansas, did Obama experience a significant drop (6 percentage points) in the share of the white vote he received.

C. Accounting for Party and Ideology

As noted above in our discussion of the section 2 jurisprudence, partisanship and ideology are often used to explain the differences in voting patterns among racial groups. Similarly, partisanship and ideology serve as frequent explanations for why whites in the states covered by section 5 differ from whites in the noncovered states in their candidate preferences. To generalize, of the groups analyzed here, blacks have been the most Democratic-leaning group, followed by

⁹⁹ See U.S. CENSUS BUREAU, POPULATION ESTIMATES (2006), available at <http://www.census.gov/popest/states/asrh/SC-EST2006-03.html>.

Hispanics, followed by whites in the noncovered states, and then followed by whites in the covered states, who are the most likely to be Republican. The exit poll data suggest that partisanship reduces but does not explain away the differences among whites across the covered and noncovered jurisdictions. It is still possible that ideological conservatism or religiosity, in addition to party, could account for the differences between whites in the covered and noncovered states.

To test for this possibility, we turn to publicly available national sample surveys that measure many more ideological and issue variables and demographic characteristics than are gauged by the exit polls. The 2008 Cooperative Congressional Election Study (CCES) provides a very large, nationally representative sample (25,000 interviews),¹⁰⁰ allowing precise estimates of differences across areas and groups, and the 2004 and 2008 American National Election Studies (ANES), which have much smaller samples,¹⁰¹ allow us to examine changes in voting behavior from an election involving two white candidates (2004) to an election involving a white and a black candidate (2008).

Although demographic and ideological variables account for much of the difference between whites in the covered and noncovered states, living in a covered state was a statistically significant factor for whites voting against Obama in 2008. *This was not the case in 2004.* The differences between whites in the covered and noncovered states could be attributed to such demographic and ideological variables when John Kerry ran against George W. Bush. The same cannot be said when Barack Obama ran against John McCain.

Table 10 presents a regression of the reported vote of whites featuring variables in the CCES data that might have an impact on vote choice, in addition to the coverage status of the state in which the respondent lived. Partisanship, ideology (self-placement on a liberal to conservative spectrum), and importance of religion exert strong influences in the expected directions. Democrats, Independents, liberals, and less religious respondents were more likely to vote for Obama, while Republicans, conservatives, and more religious respondents were less likely to do so. Education is also positively associated with support for Obama, while age, income, and being male are negatively associated. That is, older, richer, and less educated respondents, as well as male respondents, were less likely to vote for Obama.

¹⁰⁰ COOPERATIVE CONGRESSIONAL ELECTION STUDY 2008, COMMON CONTENT (2009), available at <http://web.mit.edu/polisci/portl/cces/>.

¹⁰¹ A description of the ANES sample sizes and designs is provided by ARTHUR LUPIA, JON A. KROSINICK, PAT LUEVANO, MATTHEW DEBELL & DARRELL DONAKOWSKI, USER'S GUIDE TO THE ANES 2008 TIME SERIES STUDY 8 (2009).

TABLE 10. DIFFERENCE IN SUPPORT AMONG WHITE VOTERS FOR OBAMA BETWEEN VRA COVERED AND NONCOVERED STATES, CONTROLLING FOR OTHER FACTORS, IN PRIMARY AND GENERAL ELECTIONS¹⁰²

Probability Vote for Obama
(Probit Estimates)

Independent Variable	In Primary or Caucus		In General Election	
	Coef (SE)	Coef (SE)	Coef (SE)	Coef (SE)
VRA Covered State	-0.113 (0.039)*	-0.108 (0.043)*	-0.385 (.022)*	-0.177 (.035)*
Education		0.044 (0.011)*		0.080 (.009)*
Income		0.001 (0.004)		-0.018 (.004)*
Age in Years		-0.008 (0.001)*		-0.003 (.001)*
Gender		0.179 (0.031)*		-0.066 (.026)*
Democrat		-0.128 (0.152)		1.131 (.082)*
Republican		-0.062 (0.164)		-0.818 (.084)*
Independent		0.049 (0.153)		0.199 (0.082)*
Other Party		0.134 (0.217)		-0.421 (0.102)*
Ideology		-0.157 (0.020)*		-0.719 (0.077)*
Ideology Missing		-0.396 (0.106)*		-2.187 (0.077)*
Union Member		-0.105 (0.032)*		-0.010 (0.029)
Church Attendance		-0.028 (0.015)		0.003 (0.012)
Born Again		-0.171 (0.044)*		-0.187 (0.032)*
Importance of Religion		-0.072 (.019)*		-0.144 (0.017)*
Constant	-0.021 (0.015)	0.109 (0.218)	-0.077 (0.009)	1.486 (0.126)
N	8,598	7,680	22,926	21,239
Loglikelihood	-5951.733	-5109.50	-15593.03	-6365.51

*p<0.05, **p<0.01.

¹⁰² Compiled by authors using the COOPERATIVE CONGRESSIONAL ELECTION STUDY 2008, *supra* note 100.

Even with all of these controls added, however, coverage status remains statistically significant. The coefficient drops substantially in size — from -0.385 to -0.177 — once the controls are added, but being from a covered state remains a statistically significant factor in predicting opposition to Obama. These coefficients are in a nonlinear (probit) scale. The coefficients can be used to calculate the effect of the VRA coverage variable by holding other variables in the analysis constant at their mean values and calculating the implied difference in the probabilities of voting for Obama between those states covered by the VRA and those that are not. That calculation reveals that Obama received about 15% higher vote share among whites in noncovered jurisdictions than he did in covered jurisdictions without controlling for other factors. Inclusion of the control factors shrinks that difference but does not eliminate it. Holding the other variables in the analysis constant, Obama received about 7% higher vote share among whites in noncovered jurisdictions than he did in covered jurisdictions, and that difference is statistically different from zero at the 0.01 level. In other words, party, ideology, gender, income, education, religion, and union membership explain some of the difference in vote preferences of whites between covered and noncovered jurisdictions, but these factors can account for only about half of the difference. A sizable 7 point difference remains between whites in covered and noncovered jurisdictions who have the same party, the same gender, the same educational attainment, the same income, the same union status, the same religious orientation and conviction, and the same political ideology.

Demographic, partisan, and ideological variables do, in fact, account for the differences between whites in the covered and noncovered states in 2004. In other words, when Kerry was the Democratic nominee, the differences between whites in the covered and noncovered states could be explained by whites in the covered states being more Republican, conservative, or religious. In 2008, the other demographic, partisan, and ideological variables did not explain the independent significance that being from a covered state had on predicting a vote against Obama.

Tables 11 and 12 present data from the National Election Studies (NES) for 2004 and 2008, respectively. The regressions are similar to the one provided in Table 10, but use the smaller and more limited NES dataset. Being from a covered state is statistically significant in 2008 but not in 2004. The coefficient (-0.078) is negative and statistically significant (at the 0.01 level) for 2008, meaning that whites in the covered states (all other things being equal) were about 7.8 percentage points less likely to vote for Obama. For 2004, the coefficient (0.003) is insignificant and positive.

Once again, these differences do not prove that Obama's race "caused" whites in the covered states to be more likely to vote against him. There could be any number of other variables that are omitted

TABLE 11. DIFFERENCE IN SUPPORT AMONG WHITE VOTERS FOR JOHN KERRY BETWEEN VRA COVERED AND NONCOVERED STATES, CONTROLLING FOR OTHER FACTORS¹⁰³

Independent Variable	Coef (SE)
VRA Covered State	0.003 (0.049)
Education	0.044 (0.089)
Income	0.032 (0.075)
Age in Years	0.001 (0.001)
Gender	-0.008 (0.043)
Democrat	0.243 (0.114)*
Republican	-0.303 (0.115)**
Independent	-0.004 (0.114)
Ideology	0.688 (0.112)**
Church Attendance	-0.005 (0.073)
Importance of Religion	-0.049 (0.074)
Union	0.054 (0.047)
Constant	0.157 (0.174)
N	324
Adjusted R-squared	0.522

*p<0.05, **p<0.01.

¹⁰³ Analysis conducted by the authors. For data, see UNIV. OF MICH., CTR. FOR POLITICAL STUDIES, THE NATIONAL ELECTION STUDIES, 2004 AMERICAN NATIONAL ELECTION STUDY, <http://www.electionstudies.org/study/pages/2004prepost/2004prepost.htm>.

TABLE 12. DIFFERENCE IN SUPPORT AMONG WHITE VOTERS
FOR BARACK OBAMA BETWEEN VRA COVERED AND
NONCOVERED STATES, CONTROLLING FOR OTHER FACTORS¹⁰⁴

Independent Variable	Coef (SE)
VRA Covered State	-0.078 (0.033)**
Education	-0.049 (0.127)
Income	-0.104 (0.066)
Age in Years	0.000 (0.001)
Gender	0.045 (0.032)
Democrat	0.398 (0.087)**
Republican	-0.152 (0.083)
Independent	0.154 (0.085)
Ideology	0.639 (0.079)**
Church Attendance	0.043 (0.058)
Importance of Religion	-0.071 (0.053)
Union	0.042 (0.045)
Constant	0.162 (0.155)
N	476
Adjusted R-Squared	0.560

* $p < 0.05$, ** $p < 0.01$.

¹⁰⁴ Analysis conducted by the authors. The source of this data is UNIV. OF MICH., CTR. FOR POLITICAL STUDIES, THE NATIONAL ELECTION STUDIES, 2008 AMERICAN NATIONAL ELECTION STUDY, <http://www.electionstudies.org/study pages/2008prepost/2008prepost.htm>.

from this analysis, and as such, the data do not prove that reaction to Obama's race is what distinguishes whites in the covered states from those in noncovered states. Abigail Thernstrom suggests that the drop in support among whites for Obama could be explained by him sounding "weak on national defense, and far to the left on domestic policies such as health care," the fact that "he talked openly about a redistribution of wealth," "[h]is emissions-trading proposal for global warming," and "his support for 'card-check.'"¹⁰⁵ At the same time, Kerry was a "decorated combat veteran" whose campaign did not emphasize environmental issues, and he "had no equivalent to the Reverend Jeremiah Wright in his history — a figure surely more off-putting to southern whites than to, say, Massachusetts voters."¹⁰⁶

Although we question whether this characterization accurately describes the campaigns and voters' perceptions of the candidates, we must admit that survey data do not exist to allow us to disprove all of these possibilities. What data we are able to assemble regarding these claims cast doubt on them. Adding the NES variables that measure fear of "big government" does not affect the results. Moreover, to believe these alternative hypotheses, one must assume that these differences are not picked up by self-placement as a liberal or conservative and that whites in the covered states are systematically different from whites in the noncovered states along these dimensions. In addition, to prove these arguments, it is wrong to focus simply on the relative preference for Kerry over Obama, while ignoring the relative strength of their opponents. What requires explanation is why Obama did worse among whites in some states despite the fact that he was running against a much less popular candidate in an environment that was far more favorable for the Democratic nominee than four years earlier.

This debate highlights the problem we identified earlier concerning the propriety of multivariate analysis to prove racial polarization under section 2 of the VRA. Some variable other than race almost always could explain differences in candidate preferences because no two candidates are identical along every nonracial dimension. Even if all such points of difference could be accounted for, one still could not make the argument that a voter's race "caused" her to vote a particular way. In the end, these statistics can only establish associations between the political preferences of groups of voters as defined by certain characteristics. Few voters go into the voting booth with the mindset that they will vote against a candidate specifically because he is the "candidate of choice" of the minority community.

¹⁰⁵ THERNSTROM, *supra* note 51, at 201.

¹⁰⁶ *Id.*

D. Race and Vote Choice in the 2008 Primary

If one seeks to generalize from the 2008 presidential election to gauge the potential for minority candidate success in individual states, one must account for both the primary and the general election results. In the context of section 2 litigation, for instance, advocates and scholars frequently argue that minority control of the Democratic primary is often the critical barrier to surmount for the minority to elect its preferred candidate.¹⁰⁷ Indeed, given that Democrats maintained a monopoly on Southern politics for most of the last century and a half, the Democratic primary was the only election that tended to matter. Even in the age of active partisan competition in the South and elsewhere, the hurdle of the Democratic primary often remains the more important obstacle to overcome given that a sufficient number of Democratic-leaning whites will support their party's nominee, whatever his or her race.

Reexamining the Obama victory to account for the two-stage election on a state-by-state basis, one cannot help but be surprised by the small number of states in which Obama won both the nominating contest and the general election. As Table 13 shows, in only 15 states and the District of Columbia did Obama win both the nominating event (primary or caucus) and the general election. In most states, either Hillary Clinton beat him in the nominating contest or John McCain beat him in the general election. This is important because for all other elections, a candidate must get through both the primary and general election in the same state. If either is a barrier, then the candidate will not win.

The geography of Obama's success also bears on the relevance of the coverage formula of section 5. The only fully covered state in which he won the primary and general election was Virginia, and the only partially covered state was North Carolina. Due in large part to the size of the black population in the covered states, he was able to win the primary or caucus in every fully covered state, with the exception of Arizona. But as was typical for most previous Democratic nominees, those states' large minority populations were not enough to overcome the large gap in preferences among whites in the general election. In contrast, although he won several noncovered states in both the primary and the general elections, even those represent a relatively small slice of the American population.

The structure of Obama's support in the primaries and caucuses differed somewhat from his support in the general election, as Table 10

¹⁰⁷ See Grofman et al., *supra* note 57 at 1392-93 (highlighting the importance of the primary as a hurdle for minority-preferred candidates).

TABLE 13. COMPARISON OF PRIMARY AND GENERAL ELECTION OBAMA VICTORIES BY STATE VRA STATUS

	<i>Primary or Caucus Wins</i>	<i>General Election Wins</i>	<i>Primary and General Election Wins</i>
Covered	Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia	Virginia	Virginia
<u>Partially Covered</u>	<u>North Carolina</u>	<u>California, Florida, Michigan, New Hampshire, New York, North Carolina</u>	<u>North Carolina</u>
Noncovered	Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oregon, Utah, Vermont, Washington, Wisconsin, Wyoming	Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin	Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Oregon, Vermont, Washington, Wisconsin

depicts, but important parallels remain.¹⁰⁸ Support for Obama was higher among Democratic primary and caucus voters who were more highly educated, less religious, younger, more liberal, and non-union members; not surprisingly, he did better among males than females. The key question, though, is whether Obama's support among white Democratic primary and caucus voters differed between covered and noncovered states. The analyses indicate that there is a statistically significant difference between these types of jurisdictions, and it is unaffected by the control variables included in the model. Without any controls for party, ideology, and demographics, Obama won approximately 4 percentage points more of the reported vote among whites in primaries and caucuses in noncovered states than he did among whites in primaries and caucuses in covered states. Including party identification, ideology, and demographic indicators did not alter that effect. The difference remains approximately 4 percentage points (coefficient of -0.108) and statistically different from zero at the 0.01 level.

This difference is important for two reasons. First, analysis of the primary electorate offers one way of holding party constant. The primary electorate consists of people who have chosen to participate in the Democratic Party's nominating process. They are, in that respect, Democrats. Second, and more to the substance of the legal questions involved, these results suggest that the primary election can create a second layer of difficulty for minority candidates. Observed differences in the reported preferences of white Democratic primary voters, even after controlling for their ideology, partisanship, and demographic characteristics, are correlated with the existing coverage formula.

To some extent, voter preferences did differ based on whether the respondent participated in a caucus or primary. Obama's successful strategy in the caucus states is now well known.¹⁰⁹ When we expand our analysis beyond whites, as in Table 14, we can gauge the disparities in the Obama primary and caucus vote based on race, type of nomination method, and coverage status. In states that employed primaries, whites and Hispanics in the noncovered jurisdictions were somewhat more likely to support Obama, but not by much. In the primary states, whites and Hispanics did not differ much from each other in their support for Obama, but, as is well known, they gave much less support to Obama than did African Americans. The caucus states seem to differ from the primary states, as African Americans

¹⁰⁸ As suggested in the tables, these figures come from the 2008 CCES and represent self-reporting that biased the results in favor of Obama. In other words, more respondents in the survey said they voted for Obama in the primary and caucus than the election results suggest. Nevertheless, the bias should not affect the regional differences we observe.

¹⁰⁹ See Nick Timiraos, *Obama's Strategy for Low-Turnout Caucuses Helps Drive Delegate Edge*, WALL ST. J., May 15, 2008, at A6.

TABLE 14. PERCENT OF VOTERS BY RACE REPORTING THAT THEY VOTED FOR OBAMA IN DEMOCRATIC PARTY PRIMARIES AND CAUCUSES, VRA COVERED AND NONCOVERED STATES¹¹⁰

Race	Primaries		Caucuses	
	Covered	Noncovered	Covered	Noncovered
White	46.7	48.8	50.3	60.1
Black	83.7	83.4	91.0	83.5
Hispanic	45.4	54.1	23.3	63.6

¹¹⁰ Compiled by authors using the 2008 COOPERATIVE CONGRESSIONAL ELECTION STUDY, *supra* note 100.

there reported voting in even higher percentages for Obama. Greater disparities also seem to exist based on coverage status for whites and Hispanics in the caucus states, as those in the noncovered caucus states report voting at higher levels for Obama. This might be a spurious relationship based on the particular idiosyncrasies of the smaller number of states employing caucuses, the much lower and selective turnout in such states, and the small number of respondents from those states in the survey sample. The gaps between African Americans and all others still remain.

CONCLUSION: CHANGE IN VOTING BEHAVIOR WE CAN BELIEVE IN?

Nothing in the foregoing should take away from the monumental significance of the 2008 election. The election of an African American President represents a historic event by any measure. Even conceding Barack Obama's extraordinary campaign and candidacy, his success contradicts long-held assumptions about what was possible in American democracy.

The question for us is whether the results from that election suggest a transformation of relevance to voting rights law. Our general answer is no. The 2008 election did not indicate a disruption of well-known patterns of race, region, and vote choice. If anything, Barack Obama's higher vote share among minorities and his uneven performance among whites suggest those patterns are quite entrenched.

If racially differential voting patterns were to be the criteria for coverage under a new section 5 of the VRA, however, the list of covered states would need to be changed. Virginia would be dropped and Arkansas added, for example. It is one thing to point out, as this Article does, that the covered states, as a group, exhibit larger racial gaps in candidate preferences and fewer whites willing to vote for minority-preferred candidates. It would be quite another thing to say that the coverage formula completely and exclusively captures the most polarized polities. It clearly does not, nor was it ever expected to do so.

Obama's success highlights when racially differential voting patterns make a difference and when they do not. In some states, a sufficient number of whites were willing to vote for him so he did not need to rely on minority voters to cast the decisive or pivotal votes. In other states, his mobilization of minorities (and perhaps the demobilization of whites) overcame the effect of any polarization that existed in the electorate. In still others, particularly and ironically those with large African American populations, mobilization of minorities could not make up for the low share of the white vote he garnered.

For various reasons, the Voting Rights Act should be transformed. Indeed, specifically to provide greater protection for minority voting rights, we would support a fundamental rethinking of basic compo-

nents of the Act and how it structures American politics. Results from the 2008 election should not be the cause for that undertaking, however. The election of an African American as President is significant in its own right, not because it casts doubt on the VRA's continued utility or constitutionality.

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